IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 761 of 1993

For Approval and Signature:

Hon'ble MISS JUSTICE R.M.DOSHIT
and
Hon'ble MR.JUSTICE A.L.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

BHIKHUBHAI N RATHOD

Versus

STATE OF GUJARAT

Appearance:

MR MITHANI for appellant

MR MA BUKHARI, APP, for Respondent No. 1

CORAM : MISS JUSTICE R.M.DOSHIT
and
MR.JUSTICE A.L.DAVE

Date of decision: 12/12/2000

ORAL JUDGEMENT

(Per : MR.JUSTICE A.L.DAVE)

1. The appellant in this appeal was the accused person in Sessions Case No.68 of 1989 before the Sessions Court, at Bhavnagar. The appellant was tried and convicted by the learned Additional Sessions Judge, Bhavnagar, for offence punishable under Section 302, Indian Penal Code by judgment and order dated the 8th July, 1993.

2. Mr. Mithani is appointed to represent the appellant in place of Mr. Pancholi, who was formerly representing the appellant.

3. The facts of the case are that the appellant along with two other accused persons was charge sheeted for the offence of murder of one Babubhai Patel. according to the prosecution case, on the 23rd March, 1989, at about 9.00 P.M., the appellant in company with Dilipbhai Laxmanbhai Chauhan and Jilubhai Ramsang alias Tapubhai assaulted Babubhai and inflicted injuries with knife resulting into his death. The F.I.R. came to be lodged by one Valjibhai Dharamshibhai with Botad police and offence was registered. The police investigated into the matter and, after having found sufficient evidence against the accused persons, filed a charge sheet before the learned Judicial Magistrate, First Class, Botad. Since the case was triable exclusively by a Court of Sessions, the case was committed to the Court of Sessions at Bhavnagar, which was registered as Sessions Case No.68 of 1989. The charge was framed at Ex.5 against all the three accused persons and the learned Additional Sessions Judge, after considering the evidence led by the prosecution, came to a conclusion that the prosecution was successful in proving the case against accused No.1-Bhikhubhai Nanubhai Rathod, who is the present appellant. The learned Additional Sessions Judge acquitted Dilipbhai Laxmanbhai Chauhan and Jilubhai Ramsang alias Tapubhai of the charge by giving benefit of doubt.

4. Mr. Mithani, learned advocate representing the appellant, has taken us through the record and proceedings. His main contention is that the eye-witnesses could not have seen the incident at all. No reliance could have been placed on their deposition by the Trial Court. The conviction is, therefore, based on erroneous interpretation of evidence and the appeal may be allowed.

5. Mr. Bukhari has opposed the appeal.

6. On going through the evidence, we find that the

complainant-Valjibhai Dharamshibhai does not claim to have any personal knowledge about the incident. On basis of derived information, he has lodged the F.I.R. He was informed by Vinod that Babubhai has been assaulted with a knife. He, therefore, rushed to the house of Babubhai where he found one Iqbal, who told him that Babubhai has been shifted to the hospital. The complainant and Iqbal, therefore, went to the hospital. He found that Babubhai was under treatment and after some time, he succumbed to the injuries. The complainant had learnt that Babubhai was assaulted upon in connection with some incident that had occurred with some diamond cutters. Thus, this witness has not seen the incident.

7. Witness-Mukesh-P.W.3 (Ex.19) is the son of deceased-Babubhai. He claims to have seen the incident. According to him, he was in the house. His father had gone. His father had gone to fetch milk. When his father came back, he heard some sound indicating a fight. He, therefore, rushed out of the house. He also noticed his mother and brother along with two sisters rushing out of the house. He saw that three persons had held his father and one gave a knife blow. That knife blow was given by Bhikhubhai Nanubhai. One of the assailants was a juvenile and the three accused persons were identified by this witness in the Court.

7.1 His cross-examination indicates that he had taken his meals after his father brought the milk. He did not go to the place where his father was assaulted upon and where he had bled. He admits in his cross-examination that the cause of incident came to his knowledge through rumors. He also states that after his father was taken to the hospital, his grandfather came and inquired about the incident and he did not tell his grandfather about his having seen the incident nor did he give name of the assailant to his grandfather. He did not go to the hospital along with his father after the incident.

8. Next witness is P.W.4-Kiritbhai Babubhai, another son of the deceased. He also claims to have seen the incident. He says that he was in the house. When he heard the noise, he rushed out of the house and noticed that four persons were giving fist and kick blows to deceased-Babubhai and, at that time, the appellant-Bhikhubhai drew out a knife from his waist-band and gave a blow to deceased-Babubhai.

8.1 Cross-examination of this witness also indicates that, he has also not disclosed to anyone about his having seen the incident. He also admits that, after

three days, the police learnt about the names of the accused persons as assailants. This witness also admits that he did not go to the hospital along with the deceased. He admits to have shifted the deceased from the place of incident to the house but states that neither his clothes nor the clothes of others who helped him bringing his father home were stained with blood.

9. The discovery of weapon by the accused contemplated under Section 27 of the Evidence Act is also not properly proved. Both the Panch witnesses have not supported the prosecution case. This would further weaken the prosecution case.

10. Having gone through the material pieces of evidence, we are of the view that on deposition of these witnesses, conviction for murder cannot be founded. Their conduct is unnatural. They keep silence for three days after the incidence. Even on being asked, they did not disclose the identity of the assailants even to near and dear ones. This unnatural conduct creates doubt about the veracity of statements of these witnesses.

10.1 Added to the above defects is also a factor which needs to be noted at this stage. The Investigating Officer admits in his cross-examination that Hariharbhai, Harshadbhai and Motilal Rabari were eye-witnesses to the incident. The prosecution has not examined these witnesses.

10. Under the circumstances, we are of the view that the accused-appellant could not have been convicted for the offence of murder with which he was charged relying on these unreliable pieces of evidence in form of depositions of two eye-witnesses. The appeal deserves to be allowed and the same is allowed. The judgment and order recording conviction of the appellant for the offence of murder of Babubhai Patel and sentencing him to life imprisonment is, therefore, hereby quashed and set aside. The appellant be set at liberty forthwith, if not required in any other case. Muddamal be disposed of as directed by the Trial Court.

[MS. R.M. DOSHIT, J.]

[A.L. DAVE, J.]

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